IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0470

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JAMES LEON ALLEN,

Defendant and Appellant.

ANDERS BRIEF

On Appeal from the Montana First Judicial District Court,
Broadwater County, The Honorable Jeffrey Sherlock, Presiding

APPEARANCES:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF THE ISSUE

Whether the undersigned counsel should be permitted to withdraw from Defendant/Appellant's appeal in accord with the criteria established by the United States Supreme Court in *Anders v. California*, 386 U.S. 738 (1967).

STATEMENT OF THE CASE AND THE FACTS

A jury convicted Defendant/Appellant, James Allen (Allen), of felony criminal mischief based on the allegation he damaged a Dodge Durango belonging to his wife, Linda Puls (Puls). (Tr. at 189.) Allen maintains his innocence and disputes the facts as presented at trial by the State's witnesses. At trial, Allen testified to the following: he left on foot from the home he shared with his wife at approximately three in the afternoon on March 11, 2008. (Tr. at 147.) He returned to the homesite at approximately six in the morning the following day, having spent the interim drinking beer in local establishments. (Tr. at 150, 165-66.) He did not enter the home or the garage, but retrieved his Ford Bronco, and returned to town for coffee. (Tr. at 150.) His wife called twice asking him to come home, and a few minutes later, to accuse him of damaging her vehicle in the garage. (Tr. at 162.)

The State presented three witnesses: Puls; her sister, Cindy Bowen (Bowen); and the responding officer, Deputy Harris (Harris). Puls and Bowen both testified that they had gone out to have a bite to eat, and upon returning, Puls

told Allen she wanted a divorce. (Tr. at 49, 124.) Bowen testified Allen retreated to the garage to listen to music. (Tr. at 49.) Puls testified that Allen retreated to the garage to listen to music and drink beer, and that he instructed them not to come to the garage. (Tr. at 95.) They both testified they went to bed early, and that in the morning March 12, 2008, they discovered the door to the garage had been nailed shut. (Tr. at 52, 54, 96, 122.) They testified further that Bowen forced the door open, they discovered the damage to Puls' Durango, and called the police. (Tr. at 54-55, 96-97.) The damage included slashed tires, three large impacts through the windshield, a large scrape down the passenger side, a broken brake mechanism, and a smashed battery that caused battery acid to leak onto the paint, causing paint damage, a smashed radiator cap, and damaged alternator. (Tr. at 97-98.) Puls' insurance would not cover the damage because Allen resided with her. (Tr. at 97.)

Harris testified that after his initial on-scene investigation, he attempted to contact Allen by phone. (Tr. at 82.) He testified he later toured Townsend in an effort to locate Allen. (Tr. at 90.) After Allen was charged, he was represented by counsel from arraignment through conviction. (D.C. Doc. 27.) Upon conclusion of the one-day trial where the jury heard testimony from Puls, Bowen, and Harris, and Allen was the sole witness for the defense, the jury returned a guilty verdict.

The court sentenced Allen to five years, all time suspended with conditions, and ordered restitution of $4,103.40. (D.C. Doc. 27.)

ARGUMENT

I. UNDERSIGNED COUNSEL SHOULD BE PERMITTED TO WITHDRAW FROM DEFENDANT APPELLANT'S APPEAL IN ACCORD WITH *ANDERS*.

In *Anders*, the United States Supreme Court concluded that when counsel on appeal finds the case to be wholly frivolous after a conscientious examination, counsel should advise the court and move to withdraw. *Anders*, 386 U.S. at 744. The request to withdraw must be "accompanied by a brief referring to anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744. This brief addresses those potential matters.

However, in making such a presentation, appellate defenders have an inherent dilemma between their duty to advocate for their indigent client, and the obligation of their oath and the rules of procedure and ethics that prohibit them from making non-meritorious claims. The United States Supreme Court addressed this dilemma as follows:

> We interpret the discussion rule [of *Anders*] to require a statement of reasons why the appeal lacks merit which might include, for example, a brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the record which might compel reaching that same result. We do not contemplate the discussion rule to require an attorney to engage in a protracted argument in favor of the conclusion reached; rather, we view the rule as an attempt to provide the court with 'notice' that there

> are facts on record or cases or statutes on point which would seem to compel a conclusion of no merit.

McCoy v. Court of Appeals of Wisconsin, District 1, 486 U.S. 429, 440 (1988). Thus, the appellate defender must walk that fine line between advocacy and diligence wherein thorough research is the undoing of her client's appeal. Here, the undersigned is compelled by her duty of candor before the Court in accord with *Anders* to provide this Court with notice that diligent research has yielded just such a result. No non-frivolous issues are present in this appeal.

II. ALLEN COULD ARGUE THAT COUNSEL WAS INEFFECTIVE BECAUSE COUNSEL DID NOT RETAIN A FORENSIC IMPACT EXPERT TO PROVE THAT THE HAMMER IN EVIDENCE WAS NOT THE HAMMER USED TO COMMIT THE CRIME

Allen asserts that testimony based upon a forensic impact expert's examination of the hammer, taken by Harris from the scene, would be exculpatory and prohibit his conviction by a reasonable jury. He asserts his trial counsel was ineffective because such an expert was not provided in his defense.

The right to effective assistance of counsel is a fundamental right protected by the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution. A criminal defendant is denied effective assistance of counsel if: (1) counsel's conduct falls short of the range reasonably demanded in light of the Sixth Amendment; and (2) counsel's failure is prejudicial. *See State v. Rose*, 1998 MT 342, ¶ 12, 292 Mont. 350, 972 P.2d 321.

Claims of ineffective assistance of counsel raise mixed questions of law and fact which this Court reviews *de novo*. *State v. Herman*, 2008 MT 187, ¶ 10, 343 Mont. 494, 188 P.3d 978. Only record-based ineffective assistance of counsel claims may be raised on direct appeal. *State v. Earl*, 2003 MT 158, ¶ 39, 316 Mont. 263, 71 P.3d 1201. Record-based claims are distinguished from non-record-based claims based on whether the record fully explains why counsel took, or failed to take, a particular course of action. *State v. White*, 2001 MT 149, ¶ 20, 306 Mont. 58, 30 P.3d 340. If the defendant cannot document the allegation from within the record, the ineffective assistance of counsel claim may only be raised in a petition for post-conviction relief. *Earl*, ¶ 39.

The record does not explain why trial counsel did not provide a forensic impact expert in Allen's defense.

III. ALLEN COULD ARGUE THAT HE CANNOT BE CONVICTED OF CRIMINAL MISCHIEF BECAUSE MONTANA IS A COMMUNITY PROPERTY SATE, AND THE DURANGO BELONGED TO HIS WIFE

Allen could argue that because he and Puls were husband and wife, and Montana is a community property state, he cannot be convicted of criminal mischief to property which is part of the marital estate. Criminal mischief requires a person to affect the property of another, and therefore, since the Durango was part of the marital estate, any damage done, if he had done it, would be outside the scope of Mont. Code Ann. § 45-6-101(a).

As defined by statute, "property of another" includes property in which an offender may have an interest, if a person other than the offender has an interest in that property and the offender has no authority to defeat or impair the other person's interest. Mont. Code Ann. § 45-2-101(62).

CONCLUSION

Allen's appeal of his conviction for felony criminal mischief is frivolous and this Court should grant the undersigned's motion to withdraw as counsel on direct appeal and dismiss the appeal.

Respectfully submitted this ____ day of May, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellant to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

_____

Sarah Chase Rosario y Naber

APPENDIX